Filed 11/4/10 Von Neumann v. Vega CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MONICA VON NEUMANN,
as Executrix, etc.,

Plaintiff and Respondent,

v.

CHARLOTTE NELTON H. VEGA,

Defendant;

JOHN VEGA,

Intervener and Appellant.

E049519

(Super.Ct.No. INC163284)

OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Affirmed.

Younger Law Corp., Connie L. Younger; Holstein, Taylor & Unitt and Brian C. Unitt for Intervener and Appellant.

Peter K. Levine and Albert Gopin for Plaintiff and Respondent.

In 1991, John Von Neumann obtained a default judgment against Charlotte Vega, declaring that he was not the father of her son, John Vega.[1] (We will refer to John Von Neumann as Von Neumann, to John Vega as John, and to Charlotte Vega as Charlotte.) In 2009, John intervened in the long-dormant action and moved to set aside the default judgment. The trial court denied the motion. John appeals.

We find no error. John was not entitled to relief under Code of Civil Procedure section 473.5 because he was not a party when the judgment was entered, and it was not "against" him. He was not entitled to relief under the trial court's inherent powers because he failed to show that the default judgment had been procured by extrinsic fraud. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 1985, Von Neumann married Monica Von Neumann (Monica). During the marriage, however, he had multiple affairs, including an affair with Charlotte. As a result, on an unspecified date, he and Monica separated.

In November 1989, Charlotte gave birth to John. In January 1991, Von Neumann filed this action against Charlotte. In it, he sought a declaratory judgment that he was not John's father.

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[1] John Vega prefers to be known as John Von Neumann II. It appears, however, that his name has been changed by court order to John Vega. (See fn. 4, *post*, p. 7.) Accordingly, we are required to use the latter as his name in this opinion. (Cal. Style Manual (4th ed. 2000) § 6:13, p. 222.)

Along with the complaint, Von Neumann filed his declaration, attaching and purporting to authenticate a report by Cellmark Diagnostics (Cellmark report). The Cellmark report stated that, based on DNA testing of blood that had been drawn on January 25, 1990, from Von Neumann, Charlotte, and John, Von Neumann could not possibly be John's father.

In March 1991, Von Neumann filed a request for entry of default. With it, he filed a proof of service stating that the summons and complaint had been served on Charlotte by personal delivery. Accordingly, the clerk entered Charlotte's default. After a prove-up hearing, the trial court entered a default judgment declaring that Von Neumann was not John's father.

In 2003, Von Neumann died.[2] Monica became the executrix of his estate.

In November 2007, John turned 18. In March 2009, he filed a motion for leave to intervene. The trial court granted the motion. John then filed a motion to vacate the judgment. In it, he argued that Monica had committed extrinsic fraud by falsifying the Cellmark report.

The motion was supported by a declaration by Charlotte. She testified that when John was two months old, she agreed to paternity testing. When she and John showed up, however, she was told "that his veins were too small . . . ." Thus, no blood was drawn.

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[2] According to a declaration by Monica, Von Neumann died in 1993. At oral argument, however, her counsel represented that he actually died in 2003. Because the record also includes checks signed by Von Neumann dated 2003, we accept that 2003 is the correct date.

Charlotte also testified that she "never knew there was a paternity judgment being sought . . . ." She added, " . . . John Von Neumann acknowledged my son as his son during his lifetime and held him out as s[uch], and provided support until his death . . . ."

The motion was also supported by a declaration by John, in which he stated, " . . . I recall living with my dad, John Von Neumann, in the same house. [¶] . . . I used to call John Von Neumann Dad and I miss him very much."

The trial court denied the motion. It explained, "No evidence of falsified blood test [was] presented."

II

DISCUSSION

John argues that he was entitled to relief under Code of Civil Procedure section 473.5 (section 473.5).

Section 473.5, as relevant here, provides: "When service of a summons has not resulted in actual notice to a party in time to defend the action and a . . . default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding . . . two years after entry of a default judgment against him or her . . . ." (§ 473.5, subd. (a).)

Section 473.5 does not apply here, for two reasons. First, John was not a party entitled to "notice," and hence there is no default judgment "against" him. John relies on

the Judicial Council comments to section 473.5, which state: "Section 473.5 permits the court to set aside a default or default judgment against a defendant, or in appropriate cases *a third-party defendant* . . . ." (Judicial Council com., 15 West's Ann. Code Civ. Proc. (1979 ed.) foll. § 473.5, p. 398, italics added.) A third party defendant, however, is "[a] party brought into a lawsuit by the original defendant" (Black's Law Dict. (8th ed. 2004) p. 1518, col. 2) — in modern terms, a cross-defendant. John is a defendant-intervener, not a third party defendant.

Second, a motion under section 473.5 must be brought not more than two years after entry of the default judgment. (§ 473.5, subd. (a).) Here, the motion was brought almost *18 years* after entry of the default judgment. John claims the two-year limit was tolled because he was a minor. Minority tolling, however, applies only to "a person entitled to bring an action . . . ." (Code Civ. Proc., § 352, subd. (a).) It did not extend John's time, as an intervening *defendant*, to file a *motion*. (See *Berilla v. Pope* (1949) 94 Cal.App.2d 743, 744 [defendant's absence from state did not toll six-month limit for bringing motion under Code Civ. Proc., § 473].)[3]

John also argues that he was entitled to relief based on extrinsic fraud.

"[E]ven where relief is no longer available under statutory provisions, a trial court generally retains the inherent power to vacate a default judgment . . . on equitable grounds where a party establishes that the judgment . . . resulted from extrinsic fraud or mistake.

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[3] John has not filed an independent action to set aside the judgment, so we need not express any opinion on the merits of such an action.

[Citation.]" (*County of San Diego v. Gorham* (2010) 106 Cal.App.4th 1215, 1228.) "Extrinsic fraud only arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense. [Citations.]" (*Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1300.) "Examples of extrinsic fraud are . . . failure to give notice of the action to the other party [and] convincing the other party not to obtain counsel because the matter will not proceed (and it does proceed). [Citation.]" (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 140 [Fourth Dist., Div. Two].)

"'By contrast, fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary but has unreasonably neglected to do so. [Citation.]' [Citation.]" (*Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 844.)

The only extrinsic fraud that John asserted in the trial court consisted of alleged falsification of the DNA test results. The trial court denied the motion because it found "[n]o evidence" that the DNA test was false. John argues that this was error because Charlotte testified that no blood had been drawn from him, and this was some evidence that the DNA test was false.

The trial court may have meant only that it did not find Charlotte's testimony to be credible. However, assuming, without deciding, that it erred by not considering this evidence, the error was harmless. The introduction of false evidence would be intrinsic fraud, not extrinsic fraud. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18

Cal.4th 1, 10-11.) Thus, even if the DNA test results were falsified, John would not be entitled to relief.[4]

In this appeal, John also argues that there were several other instances of extrinsic fraud. He claims that Charlotte was never actually served. However, he did not raise this claim in his moving papers below. He relies on Charlotte's testimony, "I never knew there was a paternity judgment being sought . . . ." In light of the sworn proof of service, this presented a disputed issue of fact. Precisely because John did not raise this claim in his moving papers, Von Neumann had no opportunity to introduce any other evidence that Charlotte was served, and the trial court never made any findings on this factual issue. It would be inequitable to consider this claim for the first time on appeal.

John also claims that Von Neumann's counsel concealed the fact that the judgment was a judgment by default, rather than a judgment resulting from litigation on the merits. Once again, he did not raise this claim in his moving papers below. In any event, this fraud occurred (if at all) after the default judgment had already been entered; it could not be considered extrinsic fraud that infected the entry of the judgment.

Finally, John also claims that Charlotte's attorney had a conflict of interest. Yet again, he did not raise this claim in his moving papers below. Moreover, it is

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[4] John also argues that the DNA evidence was hearsay and that it did not comply with the Uniform Act on Blood Tests to Determine Paternity. (Former Evid. Code, §§ 890-897, Stats. 1965, ch. 299, as amended by Stats. 1981, ch. 266, § 1, p. 1355, Stats. 1983, ch. 253, § 1, pp. 748-749, and Stats. 1986, ch. 629, § 2, p. 2137; see now Fam. Code, §§ 7550-7558.) These would be mere trial errors, which could not constitute even intrinsic fraud, much less extrinsic fraud.

contradicted by his own evidence — Charlotte's declaration stating, " . . . I had no legal counsel at the time . . . ."

John claims that the conflict of interest is shown by the following evidence. In a separate (though related) case, in which both Von Neumann and Charlotte were plaintiffs,[5] they were both represented by attorney L. Barry Mack. Then, in this case, when Von Neumann requested the entry of Charlotte's default, he served the request not only on Charlotte, but also on attorney Donald E. Smith. Attorney Smith had the same address as attorney Mack. John leaps to the conclusion that Smith was in practice with Mack and therefore conflicted. The record, however, does not compel this conclusion. For example, they may have simply shared office space. Or Von Neumann may have sent Smith a courtesy copy because of the prior representation. Or Charlotte may have waived the conflict. We are not about to consider the conflicting evidence on this issue for the first time on appeal.

For all of these reasons, we conclude that the trial court properly refused to set aside the default judgment.

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[5] In 1990, Von Neumann and Charlotte had petitioned jointly to change John's last name from Von Neumann to Vega.

III

DISPOSITION

The judgment is affirmed. Monica is awarded costs on appeal against John.

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RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.